ROBERT TEO KENG TUAN v. CHEW CHONG EU & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[ORIGINATING SUMMONS NO: 24 NCVC-1924-12-2014]
8 JULY 2015

CIVIL PROCEDURE: *Originating summons – Application for – Claim for recovery of trust money – Fees held by first defendant on trust – Plaintiff filed action for trust money to be divided – Whether defendants should be allowed to hold on to fees – Whether tantamount to unjust enrichment and lack of probity – Whether appropriate for receiver and manager to be appointed to finalise accounts and divide moneys*

CIVIL PROCEDURE: *Cause of action – Claim for recovery of trust money – Fees held by first defendant on trust – Attempt to seek taking of accounts 14 years after dissolution of firm – Whether plaintiff's action time-barred by six years limitation provided under s. 6(2) Limitation Act 1953 – Applicability of s. 22(1)(b) Limitation Act 1953*

CIVIL PROCEDURE: *Action – Res judicata – Issues raised – Whether plaintiff's claim for recovery of trust money decided in earlier suit – Whether matter res judicata – Whether plaintiff estopped from filing application*

PARTNERSHIP: *Dissolution – Dissolution of firm – Whether remaining partner had right to sue in firm's name – Whether plaintiff rightly sued defendant in own name – Partnership Act 1961, s. 35(1)*

The plaintiff and the late Kuan Mei Ling ('KML'), the partners of Messrs Robert Teo Kuan & Co, and the defendants were the former partners of Hanifah Teo & Associates ('HTA'), an accounting firm, until the date of the purported dissolution of HTA. In 1999, the plaintiff and the second defendant were appointed as the Special Administrators under the Pengurusan Danaharta Nasional Berhad Act 1998 to administer two public listed companies ('the administration works'), namely RNC Corporation Berhad and Sportma Corporation Berhad ('the said companies'). The first defendant later replaced the second defendant and continued with the administration works of the said companies with the plaintiff under the name of HTA. Subsequently, the first defendant left HTA and joined another accounting firm, BDO Binder and/or BDO Capital Consultants Sdn Bhd ('BDO'). It was mutually agreed that the first defendant continued with the administration works under the name of BDO and that all subsequent fees in respect of the administration works of the said companies shall be billed by BDO, but HTA would be entitled to 30% thereof. The second defendant issued a notice of dissolution of the HTA partnership with effect from 26 December 2000. The first defendant later resigned from BDO and pursuant to it, he entered into a deed of termination of shareholders agreement with BDO ('the deed of termination'). When HTA did not receive

its share of the fees billed by BDO in respect of the administration works of the said companies *ie*, the Danaharta fees, HTA initiated a claim against BDO ('the 2006 suit') where the plaintiff claimed for payment of the said Danaharta fees, which was incidentally the same principal subject matter in the present action. In the 2006 suit, BDO filed third party proceedings against the first and second defendants, alleging that the sum of RM716, 400 had been duly paid to them. After full trial, the High Court dismissed both the 2006 suit and the third party proceedings ('HC judgment') on the basis that, *inter alia*, BDO had already paid the defendants the payment of the Danaharta fees. The plaintiff, thus, instituted this action *vide* encl. 1 ('the application') and applied for a declaration and/or order, *inter alia*, that the first and second defendants were obliged to repay a certain amount of sum to HTA. The issues that arose for determination were (i) whether the plaintiff was barred by the six years limitation period provided under s. 6(2) of the Limitation Act 1953 ('1953 Act') from attempting to seek the taking of accounts 14 years after the dissolution of HTA; (ii) whether the doctrine of *res judicata* prevented the plaintiff from re-litigating the same issues and/or subject raised in the 2006 suit; (iii) whether the plaintiff could maintain this action in his name; and (iv) whether there were merits to the application.

Held (allowing plaintiff's application in encl. 1):

(1) The plaintiff's cause of action was based on constructive trust, namely, a claim for recovery of 'trust money' and not for recovery of debt. When HTA initially sued BDO as a defendant in the 2006 suit, HTA and/or the plaintiff were not aware that the trust money was being held by the defendants. It was not until the first defendant had admitted during the trial of the 2006 suit that he had received the Danaharta fees from BDO that the plaintiff came to know that the Danaharta fees were in fact held by the first defendant on trust for HTA. Applying s. 22(1)(b) of the 1953 Act, the plaintiff's claim to recover the trust money from the trustees *ie*, the first and second defendants, was not bound by the six years of limitation period prescribed by s. 6(2) of the 1953 Act. (paras 19, 20 & 22)

(2) In the 2006 suit, HTA sued BDO for HTA's share of the total bill for the administration works *ie*, the Danaharta fees. The judge had dismissed the plaintiff's claim against the defendants/BDO because the evidence showed that BDO had already paid the Danaharta fees to the first defendant and therefore the BDO was not liable to HTA. The plaintiff's claim herein was against the first and second defendants for the recovery of the trust money, and clearly that had not been decided in the 2006 suit. Therefore the matter was not *res judicata*, and the plaintiff was not estopped from filing this application. (paras 24 & 25-27)

(3) There was no requirement on the plaintiff to bring in the estate of the deceased KML as a party. Under s. 35(1) of the Partnership Act 1961, a partnership was dissolved upon death of a partner unless there is an

arrangement to prove otherwise. The judge in the 2006 suit held that since the partnership was dissolved, the remaining partner had no right to sue in the firm's name *ie*, in the name of HTA. Therefore, the plaintiff in the present case rightly sued the defendants in his own name, and not under the name of HTA which was the case in the 2006 suit. (paras 29 & 32)

(4) Although the plaintiff was not a party to the deed of termination, since the said deed contained provisions which referred to HTA, there was nothing to preclude the plaintiff from referring to the relevant provisions of the deed of termination for the purposes of determining whether the trust money belonged to HTA, of which the plaintiff was a partner. It could not be disputed by the defendants that the Danaharta Fees paid to the first defendant was trust money which were held on trust by the first defendant for HTA. The plaintiff had filed this action not to claim the whole of the trust money for himself, but for it to be divided for the benefit of the plaintiff and the first and second defendants *ie*, 50%, 25% and 25% shares respectively. The defendants should not be allowed to hold on to the Danaharta fees because that would tantamount to unjust enrichment or lack of probity. (paras 34 & 40-41)

(5) There must be a process of dissolution of HTA to enable its affairs to be wound up, including the division of any partnership moneys. The matter could not be left open-ended and kept in abeyance. The first defendant had admitted in the Suit 2006 that he had been paid the Danaharta fees which he held on trust for HTA. That was what the plaintiff contended to be the trust money belonging to HTA. As such, it was appropriate that a receiver and manager be appointed to finalise the accounts, divide the trust money and other moneys of HTA, if any, and wind up the affairs of HTA. (para 47)

Case(s) referred to:

Mat Shah Mohamed & Anor v. Foo Say Meng & Ors [1983] 2 CLJ 194; [1983] CLJ (Rep) 254 FC ***(refd)***

Richardson v. Bank of England [1838] 4 My & Cr 165 ***(refd)***

Shahinuddin Shariff v. Mohd Amin Hasbollah [1998] 1 LNS 311 HC ***(refd)***

Soo Boon Siong v. Saw Fatt Seong & Ors [2008] 1 CLJ 365 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11

Limitation Act 1953, ss. 6(2), 22(1)(b)

Partnership Act 1961, ss. 28(1), 34(1)(c), (2), 35(1)

For the plaintiff - Ee Kah Fuk (Nur Amalina Haris with him); M/s KF Ee & Co

For the defendants - Alvin Tang (CL Tan & Karen Yong with him); M/s Ranjit Ooi & Robert Low

Reported by Suhainah Wahiduddin

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JUDGMENT

Yeoh Wee Siam J:

Background Facts

B **[1]** The plaintiff and the late Kuan Mei Ling ("KML"), the partners of Messrs Robert Teo Kuan & Co, and the defendants were the former partners of Hanifa Teo & Associates ("HTA"), an accounting firm, until the date of the purported dissolution of HTA on 26 December 2000.

C **[2]** In 1999, the plaintiff and the second defendant were appointed as the special administrators under the Pengurusan Danaharta Nasional Berhad Act 1998 to administer two public listed companies ("the administration works") namely, RNC Corporation Berhad and Sportma Corporation Berhad ("the said companies").

D **[3]** The first defendant later replaced the second defendant and continued with the administration works of the said companies with the plaintiff under the name of HTA.

E **[4]** On 31 December 1999, the first defendant left HTA and joined another accounting firm known as BDO Binder and/or BDO Capital Consultants Sdn Bhd (both to be referred to as "BDO"). As the first defendant was handling the administration works during his period with HTA, for the sake of continuity of service, it was mutually agreed that the first defendant continued with the administration works under the name of BDO.

F **[5]** In consideration for this arrangement, it was agreed that all subsequent fees in respect of the administration works of the said companies shall be billed by BDO, but HTA shall be entitled to 30% thereof.

[6] By a letter dated 12 October 2000, the second defendant issued a notice of dissolution of the HTA partnership with effect from 26 December 2000 (exh. CCE-2, defendant's affidavit in reply no. 1). No accounts have been taken subsequent to the dissolution of HTA.

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[7] On 6 January 2005, the first defendant resigned from BDO and pursuant to it, he entered into a deed of termination of shareholders agreement with BDO on 20 May 2015 ("the deed of termination") (exh. RKT-18 of the plaintiff's affidavit no. 1).

H **[8]** When HTA did not receive its share of the fees billed by BDO in respect of the administration works of the said companies, ie, RM786,400 ("the Danaharta fees"), HTA then initiated a claim against BDO on 11 September 2009 ie, Kuala Lumpur High Court Civil Suit No. S6-22-654-2006 ("the 2006 suit").

I **[9]** In the 2006 suit, the plaintiff therein/HTA claimed for payment of the Danaharta fees, which is incidentally the same principal subject matter in the present action.

[10] In the 2006 suit, BDO filed third party proceedings against the first and second defendants, alleging that the sum of RM716,400 has been duly paid to them. In their amended defence and counterclaim dated 9 July 2007, the defendants stated that they have received payment of the Danaharta fees (exh. CCE-4 of defendants' affidavit in reply no. 1).

[11] After full trial, the High Court dismissed both the 2006 suit and the third party proceedings ("the HC judgment") on the basis that, *inter alia*, BDO had already paid the defendants who were entitled to receive payment of the Danaharta fees. The plaintiff's appeal against the HC judgment (exh. RKT-1 of plaintiff's affidavit in support/AIS) was dismissed by the Court of Appeal (exh. RKT-7 of plaintiff's AIS). No leave was granted to the plaintiff to appeal to the Federal Court.

[12] Relying on the findings of the learned Judicial Commissioner ("JC") in the 2006 suit, the plaintiff then instituted this action.

Originating Summons ("OS")

[13] In this OS, *vide* encl. 1 ("the application"), the plaintiff, *inter alia*, is applying for a declaration and/or order as follows:

1. That the First Defendant and/or Second Defendant is having in their possession the sum of RM708,000.00 received by BDO Binder and/or BDO Consultants Sdn Bhd on trust for Messrs Hanifah Teo & Associates based on the finding of facts made by the learned Judicial Commissioner Puan Siti Khadijah S Hassan Badjenid in her Ladyship's grounds of judgment dated 30 March 2012 in Sivil Suit No. S6-22-654-2006 in the High Court of Malaya at Kuala Lumpur (hereinafter to be referred to as "the said sivil suit") and therefore the First Defendant and/or Second Defendant is obliged to repay the said sum of RM708,000.00 to Messrs Hanifah Teo & Associates together with interest at the rate of 5% per annum from the date the First Defendant and/or the Second Defendant received the money, i.e. from 20th November 2002 until the final and full settlement amounting to RM1,133,866.85, as of 28th Nov 2014 and still continuing;
2. That the Defendants are under obligation to render true accounts and full information on the following:
   (i) Other payments received on behalf of Messrs Hanifah Teo & Associates from BDO Binder and/or BDO Consultants Sdn Bhd which are not being raised in the above paragraph 1 and/or from any other third parties; and
   (ii) Other payments and/or any profits received in relation to any transactions concerning the partnership or from any use of the partnership property, name or business connection without other partners' knowledge and consent;

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3. That a Receiver and Manager namely Prof. Dato' Dr Chua Hock Hoo (NRIC No. 660318-06-5335) of Cheng & Co Corporate Recovery Sdn Bhd, Wisma Cheng & Co, 8-3, Jalan 2/114, Kuchai Business Centre, Off Jalan Klang Lama, 58200 Kuala Lumpur be appointed to collect the sum of RM708,000.00 together with interest at the rate of 5% per annum from the date the First Defendant and/or the Second Defendant received the money, i.e. from 20th November 2002 until the final and full settlement amounting to RM1,133,866.85, as of 28th Nov 2014 and still continuing and/or any outstanding payments or debts held by the Defendants on trust for Messrs Hanifah Teo & Associates and/or any other payments or profits held by the Defendants or any other third parties in relation to any transactions concerning the partnership or from any use of the partnership property, name or business connection;

4. That the abovenamed Receiver and Manager be appointed to manage and administer all matters pertaining to the winding up of Messrs Hanifah Teo & Associates;

5. That the Receiver and Manager's fees in relation to paragraphs 3 and 4 above be borne by Messrs Hanifah Teo & Associates;

6. That the nett proceeds after the deductions of all expenses and fees pertaining to the winding up Messrs Hanifah Teo & Associates be disbursed to the Plaintiff in 50% shares and to the Defendants in 25% shares each pursuant to the finding of facts made by her Ladyship Puan Siti Khadijah S Hassan Badjenid in the said sivil suit;

7. That the Receiver and Manager appointed be at liberty to appoint solicitors for the recovery of any amounts due to Messrs Hanifah Teo & Associates, cost of which is also to be borne by Messrs Hanifah Teo & Associates;

8. That the cost of this application be borne by the Defendants; and

9. Any other orders or reliefs that the Court thinks fit and just.

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Court's Decision Regarding Encl. 1

[14] On 23 June 2015 I allowed the plaintiff's application in encl. 1, and ordered that costs of RM4,000 be paid jointly by the defendants to the plaintiff.

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Grounds For Court's Decision

The Matter Is Not Time-barred

[15] Learned counsel for the defendants submitted that the plaintiff cannot in law claim for the Danaharta fees until an account of the dissolved partnership of HTA has been taken between the partners. In this case, no such account has been taken of the dissolved partnership to date. Therefore,

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the plaintiff is now barred by the six years of limitation period provided under s. 6(2) of the Limitation Act 1953 from attempting to seek the taking of accounts 14 years after the dissolution of HTA.

[16] Section 6(2) of the Limitation Act 1953 provides as follows:

> 6.(2) An action for an account shall not be brought in respect of any matter which arose more then six years before the commencement of the action.

The plaintiff filed this action on 24 December 2014.

[17] In paras. (a) and (a)(i) to (a)(iv) of the plaintiff's grounds for this application, the plaintiff stated as follows:

> (a) The First and/or the Second Defendant has failed to pay the outstanding sum of RM708,000.00 which was held by the First Defendant and/or the Second Defendant on trust for Messrs Hanifah Teo & Associates based on the finding of facts made by the learned Judicial Commissioner Puan Siti Khadijah S Hassan Badjenid in her Ladyship's grounds of judgments which provides, among others that;
>
> (i) The First Defendant has admitted receiving the sum of RM708,000.00 on trust for Messrs Hanifah Teo & Associates was prepared to pay the same to Messrs Hanifah Teo & Associates;
>
> (ii) The Second Defendant has knowledge of the above paragraph (a)(i);
>
> (iii) Messrs Hanifah Teo & Associates entitled to the sum of RM708,000.00 received by the First Defendant and/or Second Defendant from BDO Binder and/or BDO Consultants Sdn Bhd;
>
> (iv) The Plaintiff is entitled to receive 50% shares and the Defendants are entitled to receive 25% shares each out of all profits received by Messrs Hanifah Teo & Associates.

[18] From the above, it is clear that the plaintiff's cause of action is based on constructive trust namely, a claim for recovery of "trust money" ie, the RM708,000, and not for recovery of a debt.

[19] When HTA initially sued BDO as a defendant in the 2006 suit, HTA and/or the plaintiff were not aware that the trust money was being held by the defendants.

[20] It was not until the first defendant had admitted during the trial of the 2006 Suit that he had received the Danaharta fees from BDO on 17 February 2002 that the plaintiff came to know that the Danaharta fees were in fact held by the first defendant on trust for HTA. The second defendant also admitted during the trial that he had knowledge of it.

[21] Section 22(1)(b) of the Limitation Act 1953 provides as follows:

> Limitation of actions in respect of trust property
>
> 22.(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
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> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

[22] Applying s. 22(1)(b) of the Limitation Act 1953 to the plaintiff's case, I hold the view that the plaintiff's claim to recover the trust money from the trustees, ie, the first and second defendants, is not bound by the six years of limitation period prescribed by s. 6(2) of the Limitation Act 1953.

The Matter Is Not Res Judicata And Estoppel Does Not Apply

[23] The defendants submitted that the doctrine of *res judicata* prevents the plaintiff from re-litigating the same issues and/or subject raised in the 2006 suit (of which the defendants were joined as third parties), namely, the repayment of the Danaharta fees, which has been fully determined by the High Court and the Court of Appeal, and no leave was given by the Federal Court to appeal therefrom.

[24] With respect, I do not think that the matter is *res judicata*. In the 2006 suit, HTA sued BDO for HTA's share of the total bill for the administration works ie, the Danaharta fees. The learned judge dismissed the plaintiff's claim against the defendants/BDO because the evidence shows that BDO had already paid the Danaharta fees to Vincent Chew (ie, the first defendant in the present case), and therefore the defendants/BDO are not liable to HTA/the plaintiff. The following findings of the learned JC must be noted:

> - Mengenai 30% daripada fee yang dibayar oleh Danaharta dan merupakan hak plaintif.
>
> Keterangan menunjukkan hak Hanifah Teo & Associates sebanyak 30% telah diserahkan kepada Vincent Chew untuk dibayar kepada Hanifah Teo & Associates. Merujuk kepada persetujuan perkongsian fee, keterangan adalah jelas dan tiada pertikaian bahawa jumlah 30% daripada fee yang dibayar oleh Danaharta kini berada dalam simpanan Vincent Chew. Adalah jelas daripada keterangan bahawa mengikut perjanjian, jumlah ini adalah untuk firma Hanifah Teo & Associates dan bukan untuk diberi secara peribadi kepada sesiapa. Mengikut keterangan jumlah secara kolektif yang berada dengan Vincent Chew untuk maksud tersebut adalah sebanyak RM708,000.00 dan jumlah tersebut dipegang atas amanah untuk firma plaintif. Ini diakui oleh Vincent Chew sendiri dan semasa perbicaraan dijalankan Vincent Chew menyatakan kesediaannya untuk membayar. *Sama ada jumlah ini dibayar kepada Dato' Robert Teo ataupun kepada Vincent Chew keadaannya adalah sama iaitu sebagai pemegang amanah*

untuk Hanifah Teo & Associates. Daripada keterangan juga adalah jelas bahawa firma Hanifah Teo & Associates telah dibubarkan maka urusan penggulungan menyusul dan butiran akaun penuh perkongsian perlu ditentukan sebelum jumlah yang berlebihan diagihkan di antara pemegang-pemegang saham mengikut hak dan kepentingan masing-masing.

Mahkamah : *Bayaran oleh David Siew kepada Vincent Chew adalah atas amanah untuk dibayar kepada akaun Hanifah Teo & Associates yang masih belum dibayar. Dato' Abu Hanifah mempunyai pengetahuan mengenai perkara ini.*

- Liabiliti defendan-defendan.

Mahkamah: Defendan-defendan tidak menanggung liabiliti terhadap plaintif memandangkan *jumlah 30% fee dari Danaharta yang telah dibayar kepada Vincent Chew adalah bayaran untuk Hanifah Teo & Associates.* (emphasis added) (see pp. 5 and 6 of the HC Judgment in pp. 28 and 29 of exh. RKT-1 of plaintiff's affidavit in support in encl. 2).

[25] Pursuant to the learned JC's findings in the 2006 suit, the plaintiff is now applying for the return of the Danaharta fees which have been paid by BDO to the first and second defendants. It was only through 2006 suit that the plaintiff came to know that the first defendant was paid the Danaharta fees and the first defendant had admitted that he held it on trust for HTA. The second defendant had full knowledge of it.

[26] In the 2006 suit, since the defendants/BDO were found not to be liable, it follows that their third party proceedings against the first and second defendants were dismissed as well.

[27] The findings of the learned JC in the 2006 suit now form the basis of the plaintiff's present application. The plaintiff's claim herein is against the first and second defendants for the recovery of the trust money, and clearly that has not been decided in the 2006 suit. Therefore the matter is not *res judicata*, and the plaintiff is not estopped from filing this application.

Plaintiff Can Maintain This Action In His Name

[28] The defendants submitted that the estate of the late KML should be made a party to this action since the late KML was the plaintiff's partner.

[29] I am of the opinion that there is no requirement on the plaintiff to bring in the estate of the deceased KML as a party. This is for the reason that under s. 35(1) of the Partnership Act 1961, a partnership is dissolved upon death of a partner unless there is an arrangement to prove otherwise.

[30] Section 35(1) of the Partnership Act 1961 reads as follows:

Dissolution by bankruptcy, death or charge

35.(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

[31] In any case, the defendants did not adduce any evidence to rebut the plaintiff's evidence that the late KML was a non-equity partner and therefore it is not necessary for her estate to be made a party to this action.

[32] The learned judge in the 2006 suit held that since the partnership was dissolved, the remaining partner has no right to sue in the firm's name ie, in the name of HTA. Therefore, the plaintiff in the present case rightly sued the defendants in his own name, and not under the name of HTA which was the case in the 2006 suit.

There Are Merits To This Application

[33] In addition to the above grounds, I find that there are also other merits to this application.

[34] Learned counsel for the defendants submitted that the plaintiff cannot rely on the deed of termination ("the deed") that was executed, *inter alia*, between the first defendant and BDO, since the plaintiff is not a party to the deed. However, I am of the view that even though plaintiff is not a party to the deed, since the deed contains provisions which refer to HTA, there is nothing to preclude the plaintiff from referring to the relevant provisions of the deed of termination for the purposes of determining whether the trust money belongs to HTA, of which the plaintiff is a partner.

[35] Clause 6.2 of the deed of termination (exh. RKT-18 of plaintiff's affidavit no. 1) provides as follows:

> 6.2 In respect of the work carried out and/or to be continued to be carried out by CCE in RNC, the parties hereby agree that the fees receivable on the RNC assignment shall be dealt with in the following manner:
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> (i) **Thirty percent (30%) of the fees** derived from the RNC Assignment **shall continue to be payable to** the accounting firm of **Messrs. Hanifah Teo & Associates** of which CCE is still a partner. (emphasis added) (note: RNC is 1 of the said companies, and CCE refers to the first defendant).

[36] From cl. 6.2 of the deed of termination, it is crystal clear that 30% of the total fees from the administration works, ie, the Danaharta fees, are to be paid to HTA of which the first defendant was then still a partner ie, on the date of execution of the deed on 20 May 2005.

[37] The plaintiff's contention of constructive trust primarily rests upon the basis that the first and second defendants admitted to receiving the Danaharta fees on behalf of or "on trust" for HTA in the 2006 suit.

[38] Learned counsel for the defendants submitted that in itself is insufficient to establish a claim for constructive trust. He relied on *Halsbury's Laws of England* 4th edn, vol. 48 and stated that in law, a constructive trust is only imposed in cases where the circumstances are such that "it would be inequitable to allow a person to assert full ownership over a property".

He submitted that in this case no inequity arises because the High Court in the 2006 suit found that the defendants were entitled to receive the Danaharta fees and this finding was affirmed by the Court of Appeal.

[39] The learned JC in the 2006 suit made a finding that the first defendant is a partner of HTA for profits only. The division for partnership profits is 25% for each of the two defendants, and 50% for Messrs Robert Teo Kuan & Co ie, the plaintiff's firm.

[40] Based on the defendants' admissions in the 2006 suit, it cannot be disputed by the defendants that the Danaharta fees paid to the first defendant are trust money which are held on trust by the first defendant for HTA. The plaintiff filed this action not to claim the whole of the trust money for himself, but for it to be divided for the benefit of the plaintiff and the first and second defendants ie, 50%, 25% and 25% shares respectively.

[41] As submitted by learned counsel for the plaintiff, the defendants should not be allowed to hold on to the Danaharta fees because that would tantamount to unjust enrichment or lack of probity.

[42] Even though the defendants contended that the partnership of HTA was dissolved by the second defendant's letter dated 26 December 2000 (exh. CCE-2 of defendants' affidavit in reply no. 1) in accordance with s. 28(1) of the Partnership Act 1961 which provides that any partner may determine the partnership at any time on giving notice of his intention to do so to all the other partners, the fact remains that until today the accounts of the partnership have not been taken subsequent to the dissolution of HTA.

[43] Learned counsel for the defendants submitted at length that the plaintiff cannot now in law claim for the Danaharta fees until an account of the dissolved partnership of HTA has been taken between the partners. Amongst others, he relied on the following cases:

[44] In *Richardson v. Bank of England* [1838] 4 My & Cr 165, it was *inter alia*, held:

> ... and until the amount of such profit and loss be ascertained by the winding up of the partnership affairs, neither partner has any remedy against, or liability to, the other for payment from one to the other, of what may have been advanced or received.

[45] In *Shahinuddin bin Shariff v. Mohd Amin Hasbollah* [1998] 1 LNS 311; [1998] 3 MLJ 693 Abdul Malik Ishak J (as he then was) held at p. 704:

> These two cases laid down the principle that the relationship between partners cannot be construed as debtor and creditor unless the partnership has dissolved and the partnership accounts have been taken and the balance has been ascertained to be owing from one to another;
>
> The result is that, in my opinion, neither moneys in the hands of a partner, as the result of his collection and distribution of the assets of a dissolved partnership, nor moneys standing to his debit in the books of

A the firm, are moneys due to, or held by him for, the firm or the proprietors thereof. **They could not be recovered** by an action in the name of the firm, nor even **by an action by the other partners, except after an account has been taken of the dealings and transactions of the partners**. (emphasis added)

B **[46]** In *Soo Boon Siong v. Saw Fatt Seong & Ors* [2008] 1 CLJ 365; [2008] 1 MLJ 27, the Court of Appeal held:

[106] I see no reason to deny the appellant's claim as there had been **no formal dissolution** of the partnership notwithstanding the transfer of the partnership business to the second respondent in 1989. The fact that the C bank accounts of the partnership had continued to operate well into 1993 is not in dispute and would appear to confirm that the partnership had not ceased altogether. **Even if there had been a technical dissolution of the partnership**, whether upon the transfer of the partnership in 1989 or upon the death of the first respondent on 19 Jun 2001, *it does not necessarily follow that the affairs of the partnership had thereby been determined or wound up.* D *On the contrary, everything points to an unsettled and unsatisfactory state of affairs, with the properties purchased with partnership funds remaining registered in the names of the partners, the companies and the family members, and monies and documents of title belonging to the partnership remaining in the possession of the respondents.*

E [107] *The appellant's entitlement to a formal dissolution to enable the affairs of the partnership to be determined, including all transactions effected up to and after the dissolution of the partnership, is firmly established both under statute and common law. Section 31 of the Partnership Act 1961* provides as follows:

(1) Every partner must account to the firm for any benefit derived by him, without the consent of the other partners, from any transaction F concerning the partnership or from any use by him of the partnership property, name or business connection;

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any G surviving partner or by the representatives of the deceased partner.

Section 40 of the Partnership Act 1961 provides as follows:

After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue. Notwithstanding the dissolution, so far as may H be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. …

Section 41 of the Partnership Act, provides as follows:

I On the dissolution of a partnership, every partner is entitled, as and against the other partners in the firm and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such

> payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the court to wind-up the business and affairs of the firm.
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> ...
>
> [108] Indeed, the judgment of the Federal Court in *Mat Shah bin Mohamed & Anor v. Foo Say Meng & Ors fully explains why there must be a process of dissolution to enable the affairs of the partnership to be wound up and the partnership property sold and the proceeds apportioned accordingly*. ... (emphasis added).

[47] Notwithstanding the provisions of s. 34(1)(c) and (2) of the Partnership Act 1961 which provide for the dissolution of a partnership on the date mentioned in the notice as the date of dissolution, guided by the above principles in *Soo Boon Siong* (*supra*) and the Federal Court decision in *Mat Shah Mohamed & Anor v. Foo Say Meng & Ors* [1983] 2 CLJ 194; [1983] CLJ (Rep) 254; [1984] 1 MLJ 237, I am of the view that there must be a process of dissolution of HTA to enable its affairs to be wound up, including the division of any partnership moneys. The matter cannot be left open-ended and kept in abeyance. The first defendant had admitted in the 2006 suit that he had been paid the Danaharta fees which he held on trust for HTA. That is what the plaintiff contended to be the trust money belonging to HTA. As such, it is appropriate that a receiver and manager ("R & M") be appointed to finalise the accounts, divide the trust money, and other moneys of HTA, if any, and wind up the affairs of HTA.

[48] The defendants objected to Prof Dato' Dr Chua Hock Hoo ("Dato' Chua") as proposed by the plaintiff to be the R & M/liquidator for HTA on the ground that he is unfit for this role because there has arisen a conflict of interest on his part due to his accounting firm having previously audited the accounts of HTA Corporate Services Sdn Bhd ("HCAS"), which is an associated company of HTA.

[49] I do not think that Dato' Chua would have any conflict of interest if appointed as prayed by the plaintiff. This is for the following reasons submitted by the plaintiff:

(i) HTA and HCAS are separate legal entities;

(ii) HCAS has been dormant for more than 13 years since 2003;

(iii) There are no dealings or transactions conducted between HTA and HCAS since 2003.

[50] There is no concrete evidence adduced by the defendants to prove Dato' Chua's alleged conflict of interest should he be appointed as R & M of HTA. As such, there is no good reason why Dato' Chua should not be appointed as prayed.

[51] Learned counsel for the defendants submitted further that there is no basis for the plaintiff to impose interest at 5% per annum on the Danaharta fees for a period of 12 years.

[52] Section 11 of the Civil Law Act 1956 gives the court the discretionary power to award pre-trial interest on any debt or damages for the period between the date when the cause of action arose and the date of the judgment.

[53] I am of the view that prayer 1 of the application can be allowed together with the 5% interest prayed for. These monies will not be paid immediately to the plaintiff. Instead, being trust money, they will be paid into the account of HTA and to be managed by the R & M, Dato' Chua, until final accounts are taken and the moneys and other moneys, if any, of the partnership are divided amongst the plaintiff and the two defendants.

[54] I am of the opinion that the above decision is in the interest of justice, and it would bring finality to the dissolution of HTA.

[55] Based on the above considerations, I therefore ordered accordingly.

[56] Learned counsel for the defendants then made an oral application for an interim stay of the decision. I did not allow the oral application. I informed learned counsel that he is required to file a written application for stay.